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No. 466

IN THE

Supreme Court of the United States

COKE R. STEVENSON, *Petitioner,*

v.

LYNDON B. JOHNSON, ET AL., *Respondents.*

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

TO THE SUPREME COURT OF THE UNITED STATES:

Respondents respectfully submit this brief in opposition to the petition for writ of certiorari and in reply to the brief for petitioner.

Statement of the Case.

The case is fairly stated in the opinion of the Court of Appeals, and that statement is adopted with the following additions (R. 45-50). None of the election officials who are alleged to have committed or participated in the alleged fraud were parties to the suit. There are no allegations that Johnson or the other respondents were parties to, participated in, or were cognizant of any fraud, as alleged. There are no allegations of conspiracy (See Complaint, R. 1, and Amended Complaint, R. 7).

Reasons for Denying the Petition.

The petition should be denied and writ of certiorari refused for the following reasons:

1. The questions presented are moot. They call on this Court for an opinion on abstract propositions only.

2. The case was correctly decided by the Court of Appeals.

3. Petitioner is not entitled to have the cause remanded in order to amend in an attempt to state a cause of action for damages.

ARGUMENT.

Point One.

The Questions Presented Are Moot. They Call on This Court for an Opinion on Abstract Propositions Only.

Authorities and Argument.

The General Election was held in Texas on November 2, 1948, under the provisions of Federal law[1] and the provisions of the statutes of Texas.[2] The time for canvassing the vote, making returns of the election and issuance of certificate of the election has expired.[3] Respondent Lyndon B. Johnson was duly elected. The issues raised in the present case relate solely to the primary election. Not only is that election completed, but the general election has been held and completed. Accordingly, this case presents no issues which can or should be subject to the processes of equity. It is the province of the Court to decide real controversies, not to discuss or give opinions on abstract propositions.[4]

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[1] U. S. C., Title 2, Section 7.

[2] R. S. of Texas, 1925, Articles 2930, as amended, and 3086.

[3] R. S. of Texas, 1925, Articles 3026-3035.

[4] Ashwander v. Tennessee Valley Authority, 297 U. S. 288; Barker Painting Co. v. Local 734, B. P. D. P., 281 U. S. 462; George Moore Ice Cream Co. v. Rose, 289 U. S. 373; 14 Am. Jur. (Courts), Section 49, Page 277.

None of the relief sought by petitioner would be effective if the judgment of the Court of Appeals is set aside. The relief sought upon trial on the merits was that plaintiff have judgment (1) permanently enjoining the issuance of a certificate of nomination of Johnson, and if one had been issued, then cancelling and annulling such certification so made; (2) that the defendant Brown, Secretary of State, and all other defendants named as election officials be permanently enjoined from preparing any official ballot for use in the General Election on November 2, 1948, carrying the name of the defendant Lyndon B. Johnson as the nominee of the Democratic Party of Texas for the office of United States Senator from the State of Texas; and (3) for judgment declaring plaintiff received the nomination of the Democratic Party of Texas for United States Senator.

It is obvious that the only effective relief which the Court could have granted to petitioner, if the Court had jurisdiction and authority to grant any relief, would have been to prevent the name of Johnson from being printed on the official ballot at the General Election to be held on November 2, 1948. It is remotely possible—although we deny it—that the Court might have had power also to declare petitioner to be the Democratic nominee and require that his name appear on the official ballot as such nominee. While it may be argued that nomination by the Democratic Party is equivalent to election, such argument is premised on the name of the nominee appearing on the official ballot. Election is determined by votes cast in the General Election, and it cannot with any show of reason be argued that a nominee whose name is not printed on the official ballot is assured of election.

Point Two.

The Case Was Correctly Decided by the Court of Appeals.

Authorities and Argument.

District Courts of the United States have no jurisdiction over election contests.

The jurisdiction of the district courts is limited to those cases within Article III, Section 2 of the Constitution over which an Act of Congress has given them jurisdiction. The only Act of Congress which it may be argued confers jurisdiction on United States District Courts over an election contest appears as Section 1344, Title 28, U. S. C. (revised), headnoted "*Election disputes.*" This section confers jurisdiction on the district courts "of any civil action to recover possession of any office" and specifically exempts the office of United States Senator. By a "civil action to recover possession of any office" it was evidently the intent of Congress to limit the action to a *quo warranto* proceeding, which is the only proceeding, absent statutory authority, for testing the right to public office. Courts of general jurisdiction have no power, either in law or equity, to try election contests unless expressly authorized to do so by constitutional or statutory provisions.[5]

The fact that Congress found it necessary to enact Section 1344 of Title 28, U. S. C. (revised) in order to confer jurisdiction on the District Courts over the limited type of election disputes therein enumerated conclusively establishes that it did not intend that other and general statutes should have the effect of conferring jurisdiction on the District Courts of all election disputes involving alleged denial

[5] 29 C. J. S. pp. 355-358, Sec. 247, 18 Am. Jur. pp. 359-60, Sec. 272. The reason for the rule is that courts have universally recognized that the conduct of elections constitutes an exercise of a political function of the Government to which judicial authority does not extend unless specially conferred.

of any and all rights guaranteed the citizens by the Constitution and laws of the United States.

If it be conceded that the Congress has the power under Article I, Section 4, and Article III, Section 2 of the Constitution to confer jurisdiction on the District Courts to hear and determine election contests, the question recurs, whether Congress has exercised that power. The history of congressional legislation on the subject has been reviewed fully by this Court in *United States* v. *Gradwell,* 243 U. S. 476, wherein it is demonstrated that Congress did provide for the regulation and supervision of elections in the Enforcement Acts of 1870 and 1871, which were repealed in 1893, the basis of the repeal being the report of a Congressional Committee that such matters were better left to the states. Petitioner, in effect, concedes that the District Court has no jurisdiction over election contests, by resorting to a labored argument that this is not an election contest.

The Court of Appeals correctly decided that the suit was essentially and in fact an election contest. Petitioner argues that this is not an election contest because the character of proof necessary to the granting of the relief sought would also be appropriate in the trial of a criminal case.[6] Such argument is begging the question. In order to sustain a criminal prosecution, it would only be necessary to show that one fraudulent vote was cast or counted; or, in a proper case, to show that there was a conspiracy to make fraudulent returns or to bribe voters. In order for a court to give petitioner the only effective relief sought here, it would be necessary for the Court to ascertain first whether there were fraudulent votes cast and returned, and, if so, whether they had the effect of changing the result. It would be appropriate for the defendant in such action to show, as respondents proposed to show, and in fact did show, that there were more illegal votes cast, counted and

[6] Citing U. S. v. Classic, 313 U. S. 299, and U. S. v. Saylor, 322 U. S. 385.

returned for petitioner than those alleged to have been returned for respondent Johnson.[7]

Evidence of illegal votes in certain boxes did not entitle petitioner to the relief sought unless all of the evidence showed that but for such votes the result would have been different. If the face of the returns had showed a majority of 100,000 votes for Johnson, certainly it could not be said that because 308 votes counted for him were fraudulently returned, petitioner would be entitled to the relief he sought.

The relief sought is exactly the relief sought in an election contest, and the type of relief that can be granted only in an election contest. Likewise, the evidence necessary to determine whether petitioner was entitled to the relief sought is exactly the evidence necessary to the determination of an election contest. The necessary evidence means all legally admissible evidence tendered by both parties in respect to illegal voting, and this would be admissible and appropriate in no other action than an election contest.

The Constitution and laws of the United States deny to District Courts jurisdiction of a suit involving the title to the office of United States Senator. Article I, Section 5 of the Constitution specifically provides that "each House shall be the judge of the Elections, Returns, and Qualifications of its own members . . ." It is evident that the Con-

[7] By his pleadings, Johnson alleged that he was prepared to show and would show at a proper time and in a proper forum that more illegal votes were cast, counted and returned for petitioner than those alleged to have been so returned for respondent Johnson (R. 36-37). The statement appearing in the petition (p. 4) that the "statement of facts brought up on the appeal discloses that the material allegations of the complaint and amendments were sustained by the testimony before the trial court" is not true. Petitioner alleged that there were 308 votes illegally returned for respondent Johnson in two counties. The evidence to sustain such allegations was slight, if indeed it were admissible or of any probate force in a trial on the merits. Respondents introduced evidence to show that a trial before a court of competent jurisdiction in a contest for a local office resulted in a judicial ascertainment that 1736 illegal votes had been cast in one county, out of which petitioner Stevenson had received 468 votes more than respondent Johnson.

gress considered this provision of the Constitution as conferring exclusive jurisdiction on its two Houses and for that reason denied District Courts jurisdiction of actions involving the office of United States Senator and Representative in or delegate to Congress.

The brief for Petitioner grounds his right on the Seventeenth Amendment to the Constitution, providing for the election of Senators, and on Article I, Section 4 of the Constitution, providing that the times, places and manner of holding elections for Senators shall be prescribed in each state by the legislature thereof but that the Congress may at any time by law make or alter such regulations, and on Section 1 of Title 2, United States Code, 1946, providing that a United States Senator shall be elected by the people of the State. In the complaint it is alleged that "the rights and property involved in this action are nomination by the Democratic Party of Texas for the office of United States Senator from Texas for a term of six years, beginning in January, 1949, and which nomination amounts to election to the office of United States Senator from Texas for said term."

Petitioner is in the unenviable position where he must blow hot and blow cold. As a basis for his claimed right, he relies on the provisions of the Constitution and laws of the United States providing for the election of United States Senators by vote of the people. To bring himself within the provisions of those sections of the Constitution and statutes, he must argue that the contest involves an election. But when confronted with the fundamental principle that courts are without jurisdiction to determine election contests unless clothed therewith by statutory or constitutional provisions and when confronted with the provisions of Article I, Section 5 of the Constitution and Section 1344 of Title 28 of the Code, which specifically deny jurisdiction to the Federal Courts, petitioner must take the opposite position and contend that the controversy is not over an election but over a Party nomination.

Petitioner has wholly failed to allege any facts sufficient to state a cause of action within the jurisdiction of the District Court. Petitioner relies, as he must, on Title 28, Section 1343, U. S. C., the pertinent parts of which are:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:"
>
> * * * * *
>
> "(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

It will be noted that jurisdiction is conferred on the District Courts only of a "civil action authorized by law." Petitioner then points to the only law which can be found to authorize any such action, being Title 8, Section 43, U. S. C., reading:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

It will be noted that petitioner does not sue the "person" who allegedly subjected the party injured to the deprivation of any rights allegedly secured by the Constitution and laws.

Petitioner then proceeds to claim that the "rights, privileges, or immunities secured by the Constitution and laws," of which he is alleged to have been deprived, were secured to him by the Seventeenth Amendment to the Constitution

and Article I, Section 4 of the Constitution. These provisions of the Constitution and all relevant statutes that we have been able to find simply secure to the qualified electors the right to choose their United States Senator by popular vote. None of them attempts to deal with the right of any citizen to become the candidate of a political party for the office of United States Senator, nor to prescribe how such political party shall select its candidates. The cases so strongly relied upon by petitioner[8] each dealt with the right of the people "to choose a representative in Congress" (Petitioner's brief, p. 14). This Court, in the *Gradwell case, supra,* unanimously rejected the contention that the provisions of the Constitution and statutes relied upon by petitioner conferred any rights on a candidate for office. In that case a primary election was involved. In the later case of *U. S.* v. *Bathgate,* 246 U. S. 220, such contention respecting a General Election was again rejected. This Court did not consider the right of the candidate in the *Classic case,* although such question was considered by the lower court in dismissing the indictment. In its jurisdictional statement to this Court, the Government said:

> "It was alleged that these defendants conspired to injure, oppress, threaten and intimidate citizens of the United States in the free exercise and enjoyment of rights and privileges secured to them by the Constitution and laws of the United States, i. e., (1) the right of registered voters who cast their ballots at this primary election to vote and to have their votes counted as cast for the candidate of their choice, and (2) the right of certain candidates at this primary election to have all votes cast for them counted as cast. The Government in this case is not seeking to sustain the application of Sections 51 and 52 [i.e. Sections 251 and 252, Title 18, United States Code] to the rights of candidates at primary elections. Consequently it is not challenging the ruling of the District Court [sustaining demurrer to the indictment] insofar as it applies to the second object of the conspiracy . . ."

[8] U. S. v. Classic, 313 U. S. 299, U. S. v. Saylor, 322 U. S. 385, and U. S. v. Mosley, 238 U. S. 383.

Thus, the principles enunciated in the *Gradwell* and *Bathgate* cases as establishing the rights of a candidate for office were in no manner overruled or modified by the decision in the *Classic* case. That principle was adhered to by this Court, in effect, by denying certiorari (328 U. S. 870) in *Saunders* v. *Wilkins*, 152 F. (2) 235.

It is true that this Court was then considering sections of the Criminal Code (Title 18, Sections 251 and 252, U. S. C.), but the rights there protected are no different from those protected by the provisions of Section 43 of Title 8 of the Code.[9]

Petitioner's cause, therefore, must fail on both grounds—first, that the Code gives him a cause of action only against the person who deprived him of his right and did him the injury, and, second, because the right asserted is not one guaranteed to *him* under the Constitution and laws of the United States.

If petitioner's argument be followed to its logical conclusion and if petitioner be sustained in his contentions, the United States District Courts could be called upon to exercise their equitable powers in behalf of any candidate in any election, general or primary, for any office, from Constable to United States Senator. It would only be necessary for a defeated candidate to allege that votes had been fraudulently counted so as to deprive voters of rights guaranteed under the Fifteenth Amendment to the Constitution. Federal courts would be continually called upon to use their equitable powers "to achieve or frustrate a political result." This Court, speaking through Mr. Justice Holmes, refused to be drawn into such a situation when it said: "The traditional limits of a proceeding in equity have not embraced a remedy for political wrongs."[10]

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[9] Hague v. Congress of Industrial Organizations, 307 U. S. 496, Burt v. City of New York, 156 F. (2) 791, Picking v. Pa. R. Co., 151 F. (2) 240.

[10] Giles v. Harris, 189 U. S. 475. See also Lane v. Wilson, 307 U. S. 268, Anthony v. Burrow, 129 Fed. 783, Turman v. Duckworth, 68 F. Supp. 744, and Blackman v. Stone, 17 F. Supp. 102.

Point Three.

Petition is Not Entitled to Have the Cause remanded in Order to Amend in an Attempt to State a Cause of Action for Damages.

Authorities and Argument.

titioner refers to no authority, rule or precedent entitling him to a remand of a cause where no cause of action is alleged in the complaint. The Court of Appeals properly ordered dismissal under authority of the case cited in its opinion[11] and the many other cases of like effect decided by this Court. Petitioner contents himself by stating that "it seems obvious that petitioner would have a right to amend and ask for damages on the basis of the facts alleged in the complaint" (petitioner's brief, page 47).

The facts alleged in the complaint are wholly insufficient to state a cause for damages. Petitioner now asserts that he has a right to maintain an action for damages under Section 43, Title 8, U. S. C. As heretofore pointed out, this statute provides only for redress against the person who "subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." If it be assumed that petitioner, as a candidate for office, was deprived of any such rights, nevertheless, his cause of action would be against the persons who were guilty of depriving him thereof. There is no allegation in the petition that any of the defendants named therein were guilty of depriving petitioner of any of his rights. It is alleged that fraud was committed in Jim Wells and Zapata Counties. The election officials in those counties who could have committed any of the overt acts alleged are not patries to the cause of action. It is not alleged that any of the other parties to the suit, including respondent Johnson, had any knowledge

[11] Smith v. Vulcan Iron Works, 165 U. S. 518.

of the alleged fraud, and no conspiracy is alleged. Only the defendant Tom L. Tyson, Chairman of the State Democratic Convention (who resides in Navarro County, Texas) and the defendants composing the Election Board of Tarrant County are residents within the territorial jurisdiction of the District Court for the Northern District of Texas, where the case was filed. Tyson did not take office until after the alleged fraud occurred, and both he and the Tarrant County Election Board performed only ministerial duties. Jim Wells and Zapata Counties, where the election officials reside, are in the territorial jurisdiction of the District Court for the Southern District of Texas, and the other defendants are alleged to reside within the territorial jurisdiction of the District Court for the Western District of Texas.

CONCLUSION.

From the foregoing, it is obvious that petitioner's only object in asking for certiorari and the only purpose which he hopes to gain thereby is to have this Court render an advisory opinion on an abstract question, namely, whether petitioner, as a candidate for the Democratic nomination for United States Senator from Texas, had rights, as such, which are guaranteed to him under the Constitution and laws of the United States, for deprivation of which he could maintain a suit for damages under the provisions of Section 43, Title 8, of the U. S. Code. This Court would be

proceeding contrary to all precedent if it granted certiorari on the issues presented in the petition.

WHEREFORE, respondents respectfully submit that the petition for certiorari should be denied.

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Copies of this brief have been sent to each of the attorneys for petitioner.